Comerica Incorporated

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July 20, 2004

Ms. Jennifer J. Johnson
Secretary
Board of Governors of the Federal Reserve System
20th Street and Constitution Ave., NW
Washington, DC 20551
Attention: Docket No. R-1203

Re: Interagency Proposal on the Affiliate Marketing Rule Under the Fair and Accurate Credit Transactions Act

Dear Ms. Johnson:

The following comments are provided on behalf of Comerica Incorporated, a $54.5 billion bank holding company located in various states including California, Florida, Michigan, and Texas. Comerica appreciates the opportunity to comment on this proposal.

Background

Section 214(a) of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act) amends the FCRA by adding a new section 624. These comments are in response to the proposed rule regarding the new section 624 which requires persons to provide consumers notice and an opportunity to prohibit affiliates from using certain information to make or send marketing solicitations to the consumer.

Need to Delay Compliance Date:

Many financial institutions have incorporated the affiliate sharing opt out required by FCRA into the privacy notice required by GLBA. At Comerica, processes are in place to ensure the timing of the annual privacy notice is in compliance with the requirements of GLBA and that we are appropriately staffed to accommodate the privacy mailing process. If the compliance for this provision is not delayed beyond the effective date, we will incur significant added cost to send out the new affiliate marketing opt out by itself or to accelerate our entire process to February 2005. As you can understand, the January/February time frame is already a heavy reporting period for the bank. It is also not the best time for consumers to be receiving additional information in the mail given all of the tax documents they receive. Please consider extending the compliance date to December 31, 2005. By extending the date to the end of the year, financial institutions that incorporate the FCRA opt outs with the privacy notice can more effectively integrate this change into their current process.

Responsibility for Providing an Opportunity to Opt Out:

Although it is true that in many cases it will be prudent for the affiliate giving the information to send the opportunity to opt out, there does not seem to be a compelling reason to prohibit the receiving

affiliate from accepting that responsibility. In fact the onus is on the receiving affiliate not to solicit, based upon eligibility information, a consumer who has opted out. In the case that the receiving affiliate has received eligibility information from another affiliate and an opportunity to opt out has not yet been provided, the receiving affiliate should be allowed to give the opt out opportunity as long as they allow a reasonable amount of time for the consumer to opt out prior to sending any marketing material. We would recommend that either affiliate have the option of giving notice to opt out.

Definition of "Affiliate":

In light of the clear congressional intent to allow the affiliate marketing notice to be provided in conjunction with the GLBA privacy notice, it is important to apply a consistent definition of affiliate between the GLBA and the FCRA. Therefore, we urge the commission to adopt the definition of affiliate as it has in its regulations implementing Title V, Subtitle A of the GLBA. Adopting the same definition of affiliate as the GLBA would eliminate any potential ambiguity in the definition.

Definition of "Eligibility Information":

We urge the commission to add "a person's licensed agent" into the definition of "pre-existing business relationship". The FCRA definition states that such a relationship includes a person's licensed agent among other things. It is important that the definition of pre-existing business relationship is consistent between FCRA and the final rules.

Reasonable Opportunity to Opt Out:

Although the Supplementary Information indicates that the Commission "believes that a reasonable opportunity to opt out should be construed as a general test that avoids setting a mandatory waiting period in all cases," we are concerned that the Proposal would establish a 30-day floor in virtually all cases. For example, the Commission provides that a 30-day period is appropriate when the notice is provided by mail or electronically. The only example to the contrary is limited in scope to notices provided to consumers at the time of an electronic transaction that requests the consumer to decide, as a necessary part of proceeding with the transaction, whether to opt out before completing the transaction so long as a simple process is provided at the Internet web site. Despite the Commission's stated intent to avoid setting a mandatory waiting period in all cases, we believe that these examples will be used by the plaintiffs' bar and others to establish a *de facto* 30-day requirement for purposes of opting out.

If the Commission retains the examples, we urge the Commission to continue to provide examples that are consistent with those provided in the GLBA Rule. We believe that, given the clear congressional intent to allow the FCRA and GLBA notices to be provided together, the examples of reasonable opportunities to opt out should be consistent. We ask the Commission to broaden the scope of the example provided in § 680.22(b)(3). In this regard, the example should reflect its applicability to any transaction, not just those conducted in an electronic environment. We are unaware of a justification to differentiate between transactions conducted electronically and those conducted in person, for example, with respect to requesting that the consumer decide as a necessary part of the transaction whether to opt out before completing the transaction.

Simple Method to Opt Out:

The Commission was directed by Congress to provide "specific guidance regarding how to" provide a simple method of opting out. In so doing, we urge the Commission to clarify that the Final Rule is providing *examples* of compliance. As drafted, the plain language of the Proposal could be read to mean that the four methods listed for complying with the requirement are exclusive. We do not believe this was the Commission's intent. Furthermore, we strongly urge the Commission to use the same examples for purposes of the Final Rule as are provided in the GLBA Rule. It does not make sense that Congress would intend to allow coordinated and consolidated notices with respect to the Final Rule and the GLBA Rule, but require different methods of opting out. For example, the Commission should delete the requirement to provide a self-addressed envelope under the Final Rule, since there is no similar requirement under the GLBA Rule. We also strongly urge the Commission to delete the provision that would require an electronic opt-out mechanism for consumers who receive notices electronically. We are not aware of any justification for such a requirement (would consumers who receive the notices in paper form be permitted to opt out only using paper, and not a telephone?), nor is the limitation present in the GLBA. We also do not believe that Congress intended to force financial institutions who provide their GLBA notices electronically to develop electronic opt-out mechanisms in order to coordinate their FCRA and GLBA notices.

Length of Opt Out Disclosure:

The Commission specifically seeks comment "on whether companies subject to the proposal should be required to disclose in their opt-out notices how long a consumer has to respond to the opt-out notice." We do not believe such a disclosure should be required in the Final Rule. First, Congress specified what should be included in the notice provided to consumers pursuant to Section 624, and Congress did not specify that the notice should include such information. Second, the Commission has indicated that it does not seek to set a mandatory waiting period in all cases. Therefore, it would appear that the Commission expects that the waiting period could vary, at least depending on the method the notice was delivered. We believe that companies will want to draft and print *one* notice for purposes of Section 624. However, if the company must disclose the "waiting period" to the consumer, the notice that must be given to the consumer may vary depending on the product or the method by which the notice was provided. We believe this causes an unnecessary compliance burden that does not provide benefits to the consumer.

Constructive Sharing:

The FCRA is an information sharing statute. The solicitation of a consumer by a company that it has a pre-established business relationship with is clearly allowed by the statute. In marketing the products of another company, including an affiliate, no eligibility information has been shared. Also, the affiliate did not use eligibility information to solicit the consumer. In your example, eligibility information was not shared and the affiliate did not use eligibility information to solicit the consumer. If a consumer subsequently contacts the affiliate, they have then initiated the contact and an exception applies.

We do not believe that Congress intended this statute to cover "constructive sharing". We respectfully request that you do not incorporate "constructive sharing" into the final rules.

Other Comments:

In the Supplementary Information the Commission requests comment on whether there are other means of circumventing the statute that the final rules should address. As a general matter, Congress provided precise language with respect to when Section 624 was to apply, and when it was not to apply. If the Commission attempts to define what is circumvention of the requirements, other than what has been clearly defined as such by Congress, the Commission runs the risk of implementing provisions that were not intended by Congress. If Congress intended to grant the Commission the broad authority to prevent circumvention, it could have done so.

Conclusion

Comerica commends the agencies on their thoroughness in drafting the proposed rules. Please consider the aforementioned suggestions when drafting the final rules on affiliate marketing.

Thank you again for the opportunity to comment on this important issue.

Sincerely,

C. Vance Borngesser
Vice President
Corporate Legal

Martha K. DenBaas
Vice President
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